LI-85--001-GB

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Wage and Hour Violations of Blue Fox, Inc. d/b/a Blue Fox Inn.	FINDINGS OF FACT, CONCLUSIONS AND RECOMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck, commencing at 9:00 A.M. on August 28, 1984 in Room 574 of the Space Center Building, located at 444 Lafayette Road in the City of St. Paul, Minnesota.

Steven M. Gunn, Special Assistant Attorney General, 550 Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101, appeared on behalf of the Department of Labor and Industry. Terrence W. Votel, Esq. of the firm of Reding and Votel, 814 Degree of Honor Building, St. Paul, Minnesota 55101, appeared on behalf of Blue Fox, Inc. d/b/a Blue Fox Inn. The record in this matter closed on November 1, 1984 upon receipt of the last written Memorandum filed.

This Report is a recommendation, not a final decision. The Commissioner of Labor and industry will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner of Labor and Industry shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner of Labor and Industry. Parties should contact Steve Keefe, Commissioner of Labor and Industry, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issues to be determined in this contested case proceeding are whether or not the Respondent has failed to pay the minimum wage to its employees,

whether or not the Respondent has failed to keep proper records in regard to the tip credit, whether the Respondent has failed to pay time and one-half on hours worked in excess of 48 hours, whether the Respondent should be fined or required to make restitution.

Based upon all the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In January of 1984, an auditor with the Department of Labor and industry began a review of the payroll ledgers, time cards, tip statements, proof of age certifictes and quarterly tax reports of the Blue Fox Ian to

determine compliance with the Minnesota Fair Labor Standards Act. The auditor spent approximately 20 hours on this audit. The time period covered in the audit was February 27, 1982 through January 6, 1984.

2. The audit disclosed that for the period from February 27, 1982 to February 1, 1983 the tip statement signed by waitress employees was a form which read as follows: "I have made $35.00 or more in tips in the month of (Ex. J.) The form did not record the actual amount of tips received. The waitresses actually received tips in excess of $35.00 per month which was documented in the compensation record. (Ex. K.) The Blue Fox Inn computed its tip credit based upon the number of hours worked times $.67 per hour rather than upon $35.00 per month.

3. When the Department's auditor recomputed the tip credit against the minimum wage based upon $35.00 per month, the following refunds were due to employees due to the failure to pay the minimum wage for the period in question:

Name	
Aspengren, Hope	$ 196.89
Burcheel, Laurie	145.61
Claude, Pamela K.	9.74
Darling, Dorothy	95.80
Davis, Lillian	236.42
Fuchs, Lois	410.11
Graves, Barbara	527.51
Herrick, Judy	22.47
Johnson, Doriene	185.51
Flamm, Josephine	70.76
McAmis, Diana	9.32
McClimek, Debbie	19.61
Patrin, Debra	280.75
Plath, Sue	104.76
Sitzman, Liz	64.54
Sporer, Patricia	26.48
Tobias, Janet	36.92
Wiechmann, Rosanne	14.75

(Ex. 3, Ex. C)

4. The amount of tips actually received by each waitress was recorded in the payroll ledgers (Ex. K) and was reported to the employee on a paycheck stub attached to the employee's paycheck. (Ex. I). Several waitresses employed by the Blue Fox Inn have indicated that they are not making any claim for wages due.

5. An examination of the employees time cards showed that seven employees had occasionally punched out after 1:00 A.M. but were not paid for any time worked after 1:00 A.M. When the auditor recomputed the actual number of hours worked against the wage paid, the employee compensation fell below the minimum wage. The auditor computed refunds due to the following seven employees in the following amounts:

Name	
McAmis, Diana	$ 5.86
McClimek, Debbie	40.60
Patrin, Debra	31.68
Sidebottom, Judy	48.24
Sitzman, Liz	6.00
Sporer, Patricia	23.45
Tobias, Janet	148.41

(Ex. 3)

6. Daring the period of the audit the Blue Fox Inn had a policy of not paying employees after 1:00 a.m. Waitresses were, however, required to clean up after 1:00 a.m. The duties included taking the glasses to the bar and cleaning the tables before they left. The waitresses would punch out after completing these duties. The Blue Fox Inn provided free drinks to employees after 1:00 a.m. and occasionally waitresses or bartenders would stay after 1:00 a.m. to have a drink.

7. The time records for Gerald Gladieux show that for the week of March 14 through 20th of 1982, he worked 52 1/4 hours but received no overtime payments. If 4 1/4 of those hours were computed at time and one-half, Mr. Gladieux is owed $21.25 by the Blue Fox Inn.

8. The audit also determined that four employees were paid at the rate of $3.02 per hour which is the appropriate minimum wage for an employee under the

age of 18. In the case of employees Brian Chaput, Roger Sheehy and Steve Wilke, the employer's records contained no proof of age document showing that they were minors. In the case of Liza Smith the records showed that she was an adult at the time she was paid $3.02 per hour. The minimum wage for adults was $3.35 per hour beginning January 1, 1982. If the wages due for these four employees are recomputed at the minimum wage for adults, the following amounts would be due to the employees:

Name	
Chaput, Brian	$ 12.79
Sheehy, Roger	11.63
Smith, Lisa	47.44
Wilke, Steve	19.48

(Ex. 3)

9. Steven J. Wilke was born on January 7, 1965 and was therefore 17 years old from March through June of 1982 when he worked for the Blue Fox Inn according to a age certificate submitted by the employer at the hearing. (Ex. A.)

10. In early 1982, a similar audit was done by the Department on the records of the Blue Fox Inn. The audit period was February 1980 through February 1982. At that time the Department railed a notice of labor law violation to the Blue Fox Inn dated March 24, 1982. (Ex. H) The notice contained cites to both the Fair Labor Standards Act and the rules adopted pursuant to the statute. A portion of the cited a violation of the tip credit
rule and stated that:

> "Tip credit is based on the actual amount of tips received by the employee divided by the number of hours worked in a given pay period. A maximum tip credit may be allowed up to 20% of the applicable minimum wage. The employer's records must also indicate that the individual employee received at least $35.00 per month in gratuities in order that any tip credit be allowed in that period.'

At the time of the 1982 audit, the Blue Fox Inn was employing the same employee tip statement as it was in the following two years namely, 1982 and 1983. However, prior to the increase in the minimum wage on January 1, 1982, the use of the form was not as likely to result in an excess tip credit being taken.

11. That the Department issued a Notice of Labor law Violation and Order to Comply on May 22, 1984. The Respondent then requested a hearing and the Commissioner issued a Notice of and Order for Hearing on June 28, 1984.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Administrative law Judge and the Commissioner of Labor and Industry have jurisdiction in this matter pursuant to Minn. Stat. SS 177.27,
subd. 3 and 14.50.

2. That the Department of Labor and Industry has given proper notice of the hearing in this matter and has authority to take the action proposed.

3. That the Department of Labor and Industry has complied with all relevant substantive and procedural requirements of law or rule.

4. That Minn. Stat. sec. 177.24, subd. 1 provides that every employer shall pay to each employee 18 years of age or older wages at a rate of not less than $3.35 an hour beginning January 1, 1982.

5. Minn. Stat. sec. 181A.06, subd. 4 requires an employer to keep an age certificate for each minor employed, for examination by the Department.

6. That the Respondent's records did not include an age certificate for 3 of the employees listed at Finding of Fact No. 8.

7. That the Respondent violated Minn. Stat. 177.24, subd. I by failing to pay three of the the employees set out at Finding of Fact No. 8 the adult minimum wage.

8. That Minn. Rule 5200.0120 provides that hours worked by employees includes cleaning time or any other time when the employee must be either on the premises of the employer or involved in the performance of duties in connection with his or her employment.

9. That the Respondent violated Minn. Stat. sec. 177.24, subd. 1 and Minn. Rule 5200.0120 by failing to pay the employees set out at Finding of Fact No. 5 for hours worked past 1:00 a.m.

10. That Minn. Stat. sec. 177.28, subd. 4 states as follows:

> An employee who receives $35.00 or more per month in gratuities is a tipped employee. An employer is entitled to a credit in an amount up to 20 percent of the minimum wage which a tipped employee receives. A credit against the wages due may not be taken unless at the time the credit is taken the employer has received a signed statement for that pay period from the tipped employee stating that he did receive and retain during that pay period all gratuities received by him in an amount equal to or greater than the credit applied against the wages due by his employer. The statement shall be maintained by the employer as a part of his business records.

11. That Minn. Rule 5200.0080, subp. 2 states that the Department in its investigations and audits shall require the employer to provide the signed tip statements at the time of its audit or no tip credit will be allowed.

12. Minn. Rule 5200.0080, subp. 3 states that a maximum tip credit may be allowed up to 20% of the applicable minimum wage. It also states that the

employer's records must also indicate that the individual employee received at least $35.00 per month in gratuities in order that any tip credit be allowed in that period.

13. That the Respondent violated Minn. Stat. SS 177.24, subd. 1 and 177.28, subd. 4 and Minn. Rule, 5200.0080 by failing to keep a tip statement as required by law and by claiming a tip credit in excess of the sum of $35 per month for the employees listed in Finding of Fact No. 3.

14. That Minn. Stat. sec. 177.25, subd. 1 provides that no employer shall employ any of his employees for a work week longer than 48 hours unless such employee receives compensation for his employment in excess of 48 hours in a work week at a rate of not less than 1 & 1/2 times the regular rate at which he is employed.

15. That the Respondent violated Minn. Stat. sec. 177.25 by failing to pay time and-one half to employee Gerald Gladieux as set out at Finding of Fact No. 7.

16. That Minn. Stat. sec. 177.30 requires an employer to keep for three years a record of the name, address and occupation of each of his employees, the rate of pay and the amount paid each pay period to each employee, the hours worked each day in each work week by the employee and other information as the Department shall prescribe by rule.

17. That the Respondent violated Minn. Stat. sec. 177.30 by failing to keep a tip statement as required by statute and rule.

18. That pursuant to Minn. Stat. sec. 177.27, subd. 3 the commissioner may issue an Order requiring an employer to comply with the provisions of the Minnesota Fair Labor Standards Act and that in order to comply the employer must pay back to its employees the amounts specified in Findings of Fact Nos. 3, 5, 7 and 8, except for employee Steven J. Wilke.

19. That pursuant to Minn. Stat. sec. 177.30, the Commissioner of Labor and industry has authority to assess a $100.00 fine for the failure to keep records required by law and that such a fine is appropriate for the violation noted at Conclusion No. 17.

20. That the written complaint against the Respondent which prompted the audit in this case is private pursuant to the Data Practices Act and therefore need not be produced for the Respondent in this contested case proceeding.

21. That the Statute of Limitations set out at Minn. Stat. sec. 541.07(5), does not appy to this contested case proceeding.

22. That the Respondent has failed to establish that the Department should be estopped from enforcing the tip credit rule and statute.

23. That the above Conclusions are arrived at for the reasons set out in

the Memorandum which follows and which is incorporated into these Conclusions by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of labor and Industry issue an order consistent with the foregoing Conclusions.

Dated: November 2 1984.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

The Respondent has argued that the Statute of Limitations set out at Minn. Stat. sec. 541.07(5). bars the Commissioner of Labor and industry from ordering payment of wages to its employees since a portion of the wages in question in this proceeding are beyond the two-year Statute of Limitations. Minn. Stat. sec. 541.07 provides as follows:

> Except where the uniform commercial code otherwise prescribes the following action shall be commenced with two years: . . .
>
> (5) For the recovery of wages or overtime or damages, fees or penalties occurring under any federal or state law respecting the payment of wages or overtime or damages, fees or penalties. . . .

It appears that some employees of the Respondent would be barred at this time from commencing a lawsuit in their individual capacity to recover wages from the Respondent. The Respondent argues that the Commissioner cannot do indirectly by an administrative proceeding what the employees could not do directly in a lawsuit. The Blue Fox Inn suggests that the Commissioner's right to require payment of wages is done in a representative capacity for the employees and should also be barred by the Statute of Limitations.

The Department advances two arguments in response. It argues that the Statute of Limitations does not apply to an administrative proceeding. The Department also states that even if a two-year Statute of Limitations applied the Department would need to only commence a contested case within two years of its audit.

Minn. Stat. sec. 541.07 states that "the following actions shall be commenced within two years:" Our Supreme Court discussed the application of this statute to arbitration proceedings in the case of Bar-far, Inc. v. Thorsen &

Thorshov, Inc. 218 N.W.2d 751 (Minn. 1974). The Court noted that Minn. Stat.
sec. 645.45(2) defines 'action' as 'any proceeding in any court of this state'.
Although this definition would have decided the case, the Court noted that the
definition did not apply to any law enacted prior to 1941 as was the Statute
of Limitations. The Court went on to note however that Minnesota cases which
have attempted a cannon law definition of the term "action' have restricted it

to the prosecution of a claim in a court of law. Accordingly, the Court held that the six-year Statute of Limitations was intended to be confined to judicial proceedings. 218 N.W.2d at 754.

There does not appear to be any reason to treat administrative proceedings differently from arbitration proceedings. The Legislature provided no Statute of Limitations within the Minnesota Fair Labor Standards Act. It did require an employer to maintain its employment records, which would be necessary for an enforcement proceeding, for a period of three years. Minn. Stat. sec. 177.30. The recordkeeping requirement is a practical limitation on the Department's enforcement proceedings. Since Minn. Stat. Chapter 541 has been interpreted by the Supreme Court to apply only to judicial proceedings it cannot be applied to this executive branch administrative contested case. It should be noted that the Department's audit occurred in the first few months of 1984 for the prior two-year period. The Notice of a Labor Law Violation was issued in May of 1984 and this contested case proceeding was commenced in June of 1984. This sequence of events does not indicate delay which might be prejudicial to the Respondent.

The Respondent also suggests that it has substantially complied with the statutory requirements in regard to the tip credit. The statute permits the employer to take a credit against the minimum wage. The credit is based upon the actual tips received. An employee must receive at least $35.00 per month in gratuities before the employer can take a credit. The statute clearly provides that the employer must have a signed statement from the employee stating that the employee received and retained gratuities in an amount equal to or greater than the credit taken by the employer against the minimum wage. The Respondent's tip statement merely indicated that the waitress had received in excess of $35.00 per month. It did not verify the exact amount of tips which was the figure the employer used in taking its tip credit.

It is clear that the Respondent was not in compliance with the statute from February 27, 1982 to February 1, 1983. The employer claims however that it was "substantially' in compliance by reason of the fact that the stub an the employee's pay check indicated the exact amount of tips received. The employee, of course, signed the paycheck when endorsing it for deposit. The Administrative Law Judge is unaware of any authority which would permit an employer to prevail if it 'substantially' complies with the statute. The Respondent has cited no such authority. The Department has not accepted endorsement of a paycheck in the past as compliance with the statute since it does not demonstrate that the employee agreed with the tip summary. It is

unlikely that an employee would refrain from cashing her check even if the tip amount shown was inaccurate. The Department's rule and the statute require strict compliance in order to permit the employer to take the tip credit. Compliance with the statute is normally required before the credit can be claimed. Richard v. Mariott Corporation 549 F.2d 303 (4th. Cir. 1977) Furthermore, the employer's claimed substantial compliance would not seem to satisfy the policy behind the statute and the rule. This is not a case where an alternative means of compliance meets the regulatory requirements imposed by the statute.

At the hearing the Respondent sought to discover the identity of the original complainant in this matter and asked to see the written complaint filed with the Department. The Department replied that the Commissioner of Administration had approved classification of complaint forms received by the

Department concerning alleged violations of the Fair Labor Standards Act as private data. The Department produced an Order of the Commissioner of Administration which classifies the identities of complaining employees as private data for a two-year period beginning February 17, 1983. The Department sought the private data classification because it feared employer retaliation against employees who complained to the Department. The Commissioner of Administration's decision did not protect the contents of the complaint form which did not identify the complaining employee. The employer did not press the matter further at hearing. In its brief, however, Blue Fox, Inc. states that it was denied its constitutional right of confrontation because it did not have the name and complaint of the complaining employee. It should be noted that the employer made no showing at the hearing of any need for either the identity of the complainant or the contents of the complaint. The minimum requirement for discovery in a contested case proceeding is that a party must show that the information it seeks is needed for the proper presentation of its case. Minn. Rule 1400.6700, subp. 2. Additionally, no evidence from the original written complaint was put into the record at the hearing. The Department's case was based upon the audit conducted by its investigator who testified as to her findings. The employer, of course, fully cross-examined the investigator.

Finally, the Respondent argues that the Department should be estopped from asserting a violation of the tip credit statute and rules on two grounds. First, the employer points out that at the time of the 1982 audit, it was using the same tip statement which is at issue in this proceeding. The Department auditor apparently made no criticism of the statement to the Respondent in 1982. Secondly, the employer states that it was misled by the Notice of Labor Law Violation dated March 24, 1982. A portion of that Notice recited the rule which states that the employer's records must show that each employee received at least $35.00 per month in tips in order to be able to claim a tip credit. The employer contends that this language led it to believe that its tip statement complied with the law

Equitable estoppel may lie against a public agency where a government officer authoritatively makes a specific representation which invites reliance by a private party, and a consequent change of position occurs on the part of the private party which makes it inequitable to retract the representation. Messaba Aviation Division v. County of Itasca, 258 N.W.2d 877, 880-881 (Minn. 1977). The Messaba court emphasized that a careful examination of whether or not the public interest would be frustrated by the application of estoppel must be made in each case. The Supreme Court expanded on the concept of equitable estoppel against the government in Ridgewood Development Company v. State, 294 N.W.2d 288 (1980). The Court stated that the party asserting

estoppel must show that the government, through language or conduct, induced the private party to rely in good faith on the language or conduct, to its injury detriment or prejudice. The Court noted that the private party has a heavy burden of proof to show that the equities are sufficiently great, and that this includes a showing of improper action by the government agency. 294 N.W.2d at 292-293.

Two recent Minnesota Court of Appeals cases have applied equitable estoppel to state agencies. In Beaty v. Minnesota Board of teaching, 354 N.W.2d 466 (Minn. App. 1984), the Court estopped the Board from denying that an applicant met licensure requirements where the Board's Executive Secretary and a Department employee had recommended the course work which the applicant

had completed. In Brown v. Minnesota Department of Public Welfare, 354 N.W.2d 115 (Minn. App. 1984), the Court estopped the Department from denying a payment of improperly documented medical assistance claims after the Department accepted and paid the claims for nearly one year. The court cited three elements for equitable estoppel namely, specific inducement or representation, reasonable reliance, and harm. 354 N.W.2d at 117.

In this case, the employer has failed to establish the elements necessary to invoke equitable estoppel. The Department made no specific representation or inducement similar to the above-cited cases. The auditor did not orally or otherwise approve the tip statement used by the employer in 1982. Additionally, the tip statement may have been valid during 1980 - 1982 since the minimum wage was lower and therefore the employer may not have been able to claim more than $35.00 per month as a tip credit in most cases. The situation changed when the minimum wage was raised effective January 1, 1981 and again on January 1, 1982. Likewise, the Notice of Labor law Violation dated March 24, 1982, contained no misrepresentation. It merely recited the tip credit rule which included a statement that tip credit is based on the actual amount of tips received as well as the statement that an employee must receive at least $35.00 per month in tips in order that any tip credit be allowed. The problem was in the employer's interpretation of this language. He apparently focused on the $35.00 per month requirement without considering the language that the tip credit was based on the actual amount of tips received. The Notice also provided a reference to the Minnesota Fair Labor Standards Act which also explained the operation of the tip credit.

It cannot therefore be said that the employer reasonably relied on this notice to authorize his tip credit statement nor could it reasonably rely upon the silence of the auditor in 1982 to affirm the legality of its tip statement into the future. Lastly, while the employer may have suffered some harm in terms of having to pay back wages to certain employees, a balancing of the equities involved weighs against application of equitable estoppel especially in light of the 'heavy burden' language in the Ridgewood case, supra. The Department would face a good deal of difficulty in the enforcement of the Fair Labor Standards Act if the silence of its auditors were to estop it from enforcement in the context of the facts of this case. The harm to the public interest in the enforcement of this statute outweighs the harm to the employer caused by the wage payments ordered.

G.A.B.